

No. 11999

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United States  
Court of Appeals

for the Ninth Circuit

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HARRY A. ROBERTS and RUTH M. ROBERTS,  
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

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Transcript of Record

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Upon Petition to Review a Decision of The Tax Court  
of the United States

**FILED**

SEP - 8 1948



No. 11999

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United States  
**Court of Appeals**  
for the Ninth Circuit

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Upon Petition to Review a Decision of The Tax Court  
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## INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer .....	10
Appearances .....	1
Certificate of Clerk to Transcript of Record....	66
Decision .....	19
Designation of Contents of Record, Agreed	
Revised .....	65
Docket Entries .....	1
Findings of Fact and Opinion.....	11
Petition for Redetermination of Deficiency.....	3
Exhibit A—Notice of Deficiency.....	6
Petition for Review.....	19
Notice of Filing.....	22
Transcript of Testimony, Excerpts.....	23
Witnesses for Petitioners:	
Davis, Philip	
—direct .....	34
—cross .....	41
—redirect .....	45
—rebuttal, direct .....	64

	PAGE
<b>Witnesses for Petitioners—(Con'td)</b>	
<b>Roberts, Harry A.</b>	
—direct .....	23
—cross .....	27
—redirect .....	31
<b>Witnesses for Respondents:</b>	
<b>Bryson, Lloyd E.</b>	
—direct .....	51
—cross .....	53
—redirect .....	54
<b>Hendry, Herbert C.</b>	
—direct .....	55
—cross .....	56
—redirect.....	57, 59, 62
—recross .....	58, 60
<b>Richardson, Orville</b>	
—direct .....	49
—cross .....	50
—redirect .....	50

## APPEARANCES:

For Petitioner:

GILBERT J. HEYFRON,  
EARL E. HOWARD,  
ALVA C. BAIRD,  
NORVALD T. ULVESTAD.

For Respondent:

A. J. HURLEY.

Docket No. 11856

HARRY A. ROBERTS and RUTH M. ROBERTS,  
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

## DOCKET ENTRIES

1946

Aug. 21—Petition received and filed. Taxpayer notified. Fee paid.

Aug. 22—Copy of petition served on General Counsel.

Oct. 8—Answer filed by General Counsel.

Oct. 8—Request for hearing in Los Angeles, California, filed by General Counsel.

Oct. 17—Notice issued placing proceeding on Los Angeles Calif. calendar. Service of answer and request made.

1947

Sept. 30—Hearing set Dec. 1, 1947, Los Angeles.

Dec. 12—Hearing had before Judge Disney on merits. Petitioner's brief due Jan. 2, 1948; respondent's brief due 1/20/48; petitioner's reply due 2/5/48.

Dec. 30—Transcript of hearing 12/12/47 filed.

Dec. 30—Brief filed by taxpayer. Copy served.

1948

Jan. 19—Brief filed by General Counsel.

Mar. 2—Reply brief filed by taxpayer (1). Copy served by attorney. (2 copies received 3/15/48.)

Mar. 31—Findings of fact and opinion rendered, Judge Disney. Decision will be entered for the respondent. 4/1/48 Copy served.

Apr. 2—Decision entered, Judge Disney, Div. 4.

Apr. 6—Entry of appearance of Gilbert J. Heyfron as counsel filed.

Apr. 13—Entry of appearance of Earl E. Howard, as counsel filed.

June 24—Petition for review by U. S. Circuit Court of Appeals for the 9th Circuit with assignments of error filed by taxpayer.

July 6—Proof of service filed by taxpayer.

June 24—Designation of record filed by taxpayer.

July 15—Agreed revised designation of record filed. [1\*]

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\* Page numbering appearing at foot of page of original certified Transcript of Record.



The Tax Court of the United States  
Docket No. 11856

HARRY A. ROBERTS and RUTH M. ROBERTS,  
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated May 29, 1946, and as a basis of this proceeding allege as follows:

1. The petitioners are now and were, during the taxable period here involved, husband and wife. They reside at 429 South Union Avenue, Los Angeles, California. Their return for the period here involved was filed with the Collector for the Sixth District of California.

2. The notice of deficiency, a copy of the material parts of which is attached hereto and marked Exhibit "A" was mailed to the petitioners on May 29, 1946.

3. The tax in controversy is income tax for the year 1943 in the amount of \$144.34 all of which is in dispute. [2]

4. The determination of the deficiency set forth in said notice is based upon the following errors:

(1) The Commissioner erred in determining that the wages of the taxpayers should be increased for the taxable year involved in the amount of \$661.94.

(2) The Commissioner erred in disallowing a deduction of \$100.00 expended for uniforms required to be worn by the petitioner, Harry A. Roberts, in the course of his employment.

5. The facts upon which petitioners rely as the basis of this proceeding are as follows:

(a) During the taxable year involved the petitioner was employed as a driver by the Yellow Cab Co. of California. During this period he received from patrons certain gifts or gratuities of an undetermined amount. The sums so received were in the nature of gifts and were not required to be paid by patrons of the said Yellow Cab Co. for whom he was rendering service. A regular established fare was fixed by petitioner's employer for the transportation of its patrons and your petitioner was at all times required to transport the patrons of said company at said established rate of fare and was strictly forbidden to ask for, seek or demand either directly or indirectly any additional compensation for said service but occasionally passengers of their own volition would give the petitioner, Harry A. Roberts, small gratuities in addition to the regular fare. This was always a voluntary act on their part and was in no sense a required payment to be made for the service rendered. [3]

The gifts or gratuities received as aforesaid by the petitioner, Harry A. Roberts, were not in payment of or compensation for services rendered by him or his employer and were not income within the meaning of the Internal Revenue Code.

(b) While on duty in the course of his employment as a driver for said Yellow Cab Co. of Cali-

fornia, petitioner, Harry A. Roberts, was required to wear a standard uniform meeting the requirements of the company. Your petitioner alleges that said uniform was not suitable or appropriate for ordinary civilian wear and that in the taxable year 1943 he expended for said uniforms and the repairs and upkeep thereof the sum of \$100.00; that said expense thus incurred was an ordinary and necessary business expense in the course of his trade or business.

Wherefore, your petitioners pray that the Court may hear this proceeding and disallow the deficiency determined by the Commissioner.

/s/ GILBERT J. HEYFRON,

/s/ EARL E. HOWARD,

/s/ ALVA C. BAIRD,

/s/ NORVALD T. ULVESTAD,

Attorneys for the Petitioners. [4]

State of California,

County of Los Angeles—ss.

Harry A. Roberts and Ruth M. Roberts, being duly sworn, state that they are the petitioners above named; that they have read the foregoing petition, are familiar with the statements contained therein, and that the statements contained therein are true.

/s/ HARRY A. ROBERTS,

/s/ RUTH M. ROBERTS.

Subscribed and sworn to before me this 15th day of August, 1946.

(Seal)

ELSIE GALE,

Notary Public in and for said County and State. [5]

## EXHIBIT "A"

Treasury Department  
Internal Revenue Service  
417 South Hill Street  
Los Angeles, 13, California

Office of  
Internal Revenue Agent in Charge  
Los Angeles Division  
LA:IT:90D:LHP

May 29, 1946

Mr. Harry A. Roberts, and  
Mrs. Ruth M. Roberts,  
Husband and Wife,  
429 South Union Avenue,  
Los Angeles, 13, California.

Dear Mr. and Mrs. Roberts:

You are advised that the determination of your income and victory tax liability for the taxable year ended December 31, 1943, discloses a deficiency of \$144.34 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (Not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are

requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,  
Commissioner.

By /s/ GEORGE D. MARTIN,  
Internal Revenue Agent in Charge.

Enclosures: Statement, Form of Waiver. [6]

STATEMENT

LA:IT:90DLHP

Mr. Harry A. Roberts, and Mrs. Ruth M. Roberts,  
Husband Wife,  
429 South Union Avenue,  
Los Angeles 13, California

Tax Liability for the Taxable Year Ended  
December 31, 1943

	Deficiency
Income and victory tax.....	\$144.34

In making this determination of your income and victory tax liability careful consideration has been given to the report of examination dated November

27, 1945, and to your protest dated January 29, 1946.

For the purpose of determining your income tax liability for the year 1943 under the Current Tax Payment Act of 1943, the tax liability reported in your 1942 return in amount of \$85.00 is accepted as correct.

### ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1943

	Income Tax Net Income	Victory Tax Net Income
Net income as disclosed by return.....	\$2,276.99	\$2,597.29
Unallowable deductions and additional income :		
(a) Wages increased .....	661.94	661.94
(b) Other deductions disallowed.....	100.00	.....
	<hr/>	<hr/>
Net income adjusted.....	\$3,038.93	\$3,259.23

### EXPLANATION OF ADJUSTMENTS

(a) There has been added to your income the amount of \$661.94 representing tips received by you which you failed to report in [7] your return. This income is held to be taxable under the provisions of Section 29.22(a)-2 of Regulations 111.

(b) The deduction of \$100.00 for uniforms is disallowed as not representing a proper deduction under the provisions of Section 23(a) of the Internal Revenue Code.

COMPUTATION OF INCOME AND VICTORY  
TAX—CURRENT TAX PAYMENT  
ACT OF 1943

Taxable Year Ended December 31, 1943

Income tax net income adjusted.....	\$3,038.93
Less: Personal exemption.....	\$1,200.00 1,200.00
	<hr/>
Surtax net income.....	\$1,838.93
Less: Earned income credit.....	\$ 303.89 303.89
	<hr/>
Income subject to normal tax.....	\$1,535.04
Normal tax at 6 per on \$1,535.04.....	92.10
Surtax on \$1,838.93.....	239.06
Total income tax.....	\$ 331.16
Net income tax.....	\$ 331.16
Victory tax net income adjusted.....	\$3,259.23
Less: Specific exemption.....	1,248.00
	<hr/>
Income subject to victory tax.....	\$2,011.23
Less: Specific exemption.....	1,248.00
	<hr/>
Income subject to victory tax.....	\$2,011.23
Victory tax before credit (5% of \$2,011.23) \$	100.56
Less: Victory tax credit (40%).....	40.22
	<hr/>
Net victory tax.....	60.34
	<hr/>
1. Net income tax and victory tax.....	\$ 391.50
2. Income tax for 1942.....	\$ 85.00
3. Amount of item 1 or 2, whichever is larger.....	\$ 391.50
4. Forgiveness feature:	
(a) Amount of item 1 or 2, which- ever is smaller.....	\$ 85.00
(b) Amount forgiven ( $\frac{3}{4}$ of (a)).....	63.75
	<hr/>
(c) Amount unforgiven.....	21.25
5. Correct income and victory tax liability (item 3 plus item 4(c)).....	\$ 412.75
6. Income and victory tax liability shown on return, account No. 8282363.....	268.41
	<hr/>
7. Deficiency of income and victory tax.....	\$ 144.34

[Endorsed]: Filed Aug. 21, 1946. [9]

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the tax in controversy is income tax for the year 1943; denies the remainder of the allegations contained in paragraph 3 of the petition.

4 (1) and (2). Denies the allegations of error contained in subparagraphs (1) and (2) of paragraph 4 for the petition.

5 (a). Admits that during the taxable year involved the petitioner was employed as a driver by the Yellow Cab Company [10] of California and that during this period he received from patrons certain sums in addition to the regular established fare fixed by petitioner's employer for the transportation of its patrons. Denies, however, that the sums so received were in the nature of gratuities or gifts and denies the remainder of the allegations contained in and set forth under subparagraph (a) and subdivision thereof of paragraph 5 of the petition.

5(b). Denies the allegations contained in subparagraph (b) of paragraph 5 of the petition.

6. Denies each and every allegation contained in



the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL,  
Chief Counsel,  
Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,  
Division Counsel.  
E. C. CROUTER,  
A. J. HURLEY,  
Special Attorneys,  
Bureau of Internal Revenue.

[Endorsed]: Filed Oct. 8, 1946. [11]

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10 T. C. No. 75

The Tax Court of the United States

Harry A. Roberts and Ruth M. Roberts, Petitioners, vs. Commissioner of Internal Revenue, Respondent.

Docket No. 11856

Promulgated March 31, 1948

The petitioner, a taxicab driver, received tips with fares collected from passengers. Held, that such tips are income. Held, further, on the facts that the Commissioner is not shown to have erred in adding to petitioner's income 10 per cent of his gross receipts because of such tips, in the absence of any

record kept by the petitioner. Held, further, on the facts that the Commissioner is not shown to have erred in denying deduction of costs of uniforms.

Gilbert J. Heyfron, Esq., and Earl E. Howard, Esq., for the petitioners. A. J. Hurley, Esq., for the respondent.

This case involves income taxes for the calendar year 1943. Deficiency was determined in the amount of \$144.34, all of which is in issue. The [12] questions presented are (a) whether "tips" received by petitioner, Harry A. Roberts, as a taxicab driver constitute income; and (b) whether the amount thereof was properly determined by the Commissioner; and (c) whether the expense of a uniform is business expense deductible by the petitioner.

### FINDINGS OF FACT

The petitioners are husband and wife. They filed a joint federal income tax return for the taxable year with the collector for the sixth district of California. During the taxable year the petitioner, Harry A. Roberts (hereinafter referred to as petitioner), was employed as a taxicab driver by the Yellow Cab Co. of California, in Los Angeles. During the year he received from patrons sums of money, ordinarily called "tips," in addition to the regular established fare for the transportation of patrons. He kept no record thereof. About 50 per cent of passengers tipped. He had instructions, in his contract with the Yellow Cab Co., not to solicit tips, was forbidden to do so, and did not do so. He was allowed to charge only what the taxicab meter

showed. In his contract incidental service, such as, carrying of bags, was included in the wages received. His wages were, in 1943, 45 per cent of the take, or \$6 a day, whichever was greater. He worked in 1943 about 240 to 250 days. A fifty cent fare is typical, and the usual tip therefor is ten cents. It is the same for an eighty cent fare. A \$1 fare usually does not carry a tip. On a thirty cent fare the tip is usually ten cents, sometimes fifteen. The average fare is about eighty cents. On \$10, \$5, or \$3 trips there is usually no tip. On a \$15 or \$20 trip, which is uncommon, the average tip would be 25 to 50 cents. There would be five or six \$5 trips, [13] and not more than one \$10 trip in a month. He conveyed passengers under charge accounts also and those who used Yellow Cab script, from whom no tips were received. The year 1943 was better than average; gasoline rationing approximately trebled the number of taxicab patrons so far as tips were concerned. A tip is rarely less than ten cents. Tips average, conservatively and reasonably, 10 per cent of gross bookings. Tips were more liberal during war time than in ordinary times.

The petitioner in 1943 paid \$30 for a uniform, \$24 for trousers and used several shirts. The uniform was oxford gray, with gray shirt. In 1943 the Yellow Cab Co. had no uniforms to sell and the men wore that they were able to get. The company did not require the drivers to purchase uniforms.

#### OPINION

Disney, Judge: We will first dispose of the question as to whether the Commissioner erred in con-

sidering 10 per cent of the petitioner's take as a taxicab driver as the amount of the tips. The question is one of fact. The evidence was varied and contradictory. It would serve no purpose to analyze it in detail. Considering all the evidence, we have found as a fact that the tips over the year were conservatively 10 per cent of the petitioner's gross take. There is no argument as to the amount of such gross take. Therefore, as to the amount, the Commissioner is not shown to have erred in adding \$661.94 to petitioner's income.

We next consider the question as to whether such amount constituted income to the petitioner. It is submitted to us in substance as one of first impression, for though the respondent cited Nazzareno D. Cesanelli, 8 T.C. 776, [14] he agrees with the petitioner that, though tips were therein involved, no issue was presented as to whether they constituted income to the petitioner. No other is cited as controlling. The petitioner argues that the tips were gratuities, gifts; the respondent, that they are compensation for services. He cites Regulations 111, Sec. 29.22(a)-2, covering section 22(a) of the Internal Revenue Code, which includes tips within gross income. Relying upon the Cesanelli case, he says that though the present issue was not presented there, the Court found a fraud penalty for failure to report the full amount of tips received, and therefore the Court necessarily had to consider the question, since there could have been no fraud in failing to report money unless it was income. We think the point not well taken. We can not logically

get assistance on this very real issue from a case which did not raise it. The Court, assuming that in that case the tips were income because the point was not questioned, properly did not need to consider it, and merely held that the amount duly ascertained was fraudulently not reported as income.

Nor will we put the conclusion here upon the fact that the regulation includes tips in income. The sweep of section 22(a) and its definition or description of gross income is broad, and it may be that the regulation with propriety validly construes tips as within its orbit. But considering the conclusion to which we have come we pass the point.

For we view the tips involved in this case as income. Webster's New International Dictionary defines "tip", a colloquial term, as meaning both gift and fee. Obviously, therefore, such definition helps not at all here. If the tips were compensation for services rendered, they are income. The [15] petitioner so agrees on brief, saying that the income tax act is to impose tax "upon income and not upon gifts, unless the money allegedly 'given' is in essence compensation for services or value." We think they were compensation for services. Taxation is a realistic matter, often so called. It would, in our opinion, be decidedly unrealistic not to consider that one tips taxicab drivers for service and as part of the pay therefor. That the evidence here is that the Yellow Cab Company forbade solicitation of tips and that they were not solicited proves little or nothing as to the situation between passenger and driver. For what was the petitioner as driver paid?

The common practice of tipping is proved here, if it requires proof; and imagination need not be strained to realize, so to speak, the lessened service forthcoming if passengers ceased tipping. This is not a matter of gift disassociated from service. Though gifts are perhaps ordinarily made on a personal basis, the prevalence of impersonal gifts, such as to organized charities, makes it impossible to require the personal touch in order to find gift. But where, as here, the alleged gift is contemporaneous with payment for services, the petitioner has no easy burden to show it no integral part thereof. That the payment may be a little more than absolutely necessary for the services does not, as we see it, demonstrate that it was not nevertheless payment. We consider of slight weight petitioner's argument that the tip is caused by a desire to save "face", or a desire to prove the "tippee" inferior to "tipper", or because the "tipper" likes his fellow man. We think the milk of human kindness has little to do with the matter and that the ordinary passenger is neither trying to save his face nor concerned with [16] demonstrating superiority. The passenger tips because the taxi driver expects to receive tips, and the passenger expects to pay something extra for the service.

We think that the question has, though indirectly, been definitely decided by a case not cited, *F. L. Bateman*, 34 B.T.A. 351. There we considered as tips payments made by the petitioner, a shipper of freight, to office agents, shipping clerks, and railroad and steamship employees. The situation had

in fact less connection with payment for services than in the instant case, for there the various persons receiving tips, such as shipping clerks and dock workers handling freight forwarded by petitioner, appear to have had no right at all to receive any payment from the petitioner who was not their employer; whereas here, as above seen, the tip accompanied a regular payment. Yet in the Bateman case the giver of the tip was held entitled to deduction of the amounts involved as business expenses. But to so hold, the opinion necessarily recognized the payments as made "for personal services actually rendered" within the language of section 23(a)(1)(A) of the Internal Revenue Code. Under such decision, the passenger paying the petitioner his tip had a right to deduct the amount as expense. Therefore, though we do not categorically brand the payment and receipt as necessarily reciprocal, we regard the case as demonstrative that tips are compensation for services rendered and, under the test suggested by the petitioner's brief, as income. Though, as petitioner says, intent is to be regarded, we regard the above case as a solid view of the intent involved; moreover, we do not find the intent in paying taxi tips to be donative. It is, in a very real sense, a [17] business transaction—as the Bateman case regarded it.

We have examined Herbert's *Laurel-Ventura vs. Laurel Ventura Holding Corporation*, 138 Pac. (2d) 43, and *Anders vs. State Board of Equalization*, 185 Pac. (2d) 883, (both from California courts), though they were not cited. If the reason for non-

citation was that they were considered inapplicable, we agree; for the former involves the question as to whether tips received by employees are gross receipts of an employer-landlord, who had agreed to pay a percentage of gross receipts as rent; and the latter involved the question whether employees' tips were the employer's receipts for purposes of a sales tax. We consider it obvious that the cases are of no assistance on the present question. We conclude and hold that the tips paid the petitioner were income to him.

The remaining question involves the expense of uniforms. Here, again, the testimony is in conflict as to whether uniforms were necessary. From what we regard as the better testimony, because disinterested, we find that they were not required. The evidence was, further, that in 1943 the Yellow Cab Company had no uniforms to sell and that the men had to wear what they were able to get. Under these findings, it is clear that the petitioner was acting voluntarily in buying anything in the way of uniforms, and such dress merely took "the place of an article required in civilian life" within the language of Regulations 111, section 29.24-1. Business expenses must be necessary. This one was not. We hold that the Commissioner is not shown to have erred in denying deduction for uniforms. *Marcus O. Benson*, 2 T.C. 12; *affd.*, 146 Fed. (2d) 191.

Decision will be entered for the respondent. [18]



The Tax Court of the United States  
Washington

Docket No. 11856

HARRY A. ROBERTS and RUTH M.

ROBERTS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

### DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, promulgated March 31, 1948, it is

Ordered and Decided: That there is a deficiency in income tax of \$144.34 for the calendar year 1943.

/s/ R. L. DISNEY,

Judge.

Entered April 2, 1948. [19]

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In the United States Court of Appeals  
for the Ninth Circuit

T. C. Docket No. 11856

HARRY A. ROBERTS and RUTH M.

ROBERTS,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

### PETITION FOR REVIEW

Taxpayers, the petitioners in this cause, by Gilbert J. Heyfron and Earl E. Howard, Esquires,

their counsel, hereby file their petition for a review by the United States Court of Appeals for the Ninth Circuit of the decision by the Tax Court of the United States rendered on April 2, 1948, 10 T. C. No. 75, determining deficiency in the petitioners' Federal income taxes for the calendar year 1943, in the amount of \$144.34, and respectfully show:

### I.

The petitioner, Harry A. Roberts, at the time in controversy was a taxicab driver employed by the Yellow Cab Company in Los Angeles, California, and the petitioner, Ruth M. Roberts, is his wife.

### II.

#### Nature of the Controversy

The controversy involves the proper determination of the petitioners' liability for Federal income taxes for the calendar year 1943.

In the trial court, it was the petitioners' contention that the Commissioner erred in determining that the wages of the tax payers should be increased for such taxable year in the amount of \$661.94, such increase having been based upon the Commissioners arbitrarily applying a rule of thumb of 10 per cent of the gross bookings of the taxpayer, Harry A. Roberts, in the operation of taxicabs for the Yellow Cab Company. Said arbitrary increase was based upon the Commissioner's theory that "tips" should be considered a part of the taxpayer's compensation.

Before the trial court, it was the petitioners' contention that the Commissioner should have al-

lowed a deduction of \$100.00 expended for uniforms. Since the evidence before the trial court was conflicting as to whether such uniforms were necessary, the petitioners are not further urging their contention in this latter respect.

The petitioners in their return for the taxable year involved included nothing for "tips" received.

### III.

The taxpayers, being aggrieved by the findings of fact and conclusions of law contained in the opinion of the tax court and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit. [21]

### IV.

#### ASSIGNMENTS OF ERROR

The petitioners assign as error the following acts and omissions of the Tax Court of the United States:

(1) The failure to eliminate from the petitioners' gross income for the year 1943 the amount of "tips" arrived at by the arbitrary assessment, in that such "tips" do not constitute any part of the taxpayers' wages or compensation for services, but in truth and fact are gifts.

(2) The failure of the Court to determine that the rule of thumb of 10 per cent of gross "take" applied by the Commissioner by reason of the alleged failure of the taxpayers to keep adequate records, is arbitrary and unreasonable and is not

supported by the great preponderance of the evidence.

GILBERT J. HEYFRON,  
EARL E. HOWARD,  
Counsel for Petitioners. [22]

(Duly Verified.)

[Endorsed]: T.C.U.S. Filed June 24, 1948. [23]

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[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR  
REVIEW

To Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Washington, D. C.

You are hereby notified that the petitioners on the 22nd day of June, 1948, filed with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Court of Appeals for Ninth Circuit of the decision of the Tax Court of the United States heretofore rendered in the above-entitled cause. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated at Los Angeles, California, this 22nd day of June, 1948.

Respectfully,

/s/ GILBERT J. HEYFRON, [24]

/s/ EARL E. HOWARD,

Counsel for Petitioner.

(Acknowledgment of Service.)

[Endorsed]: T.C.U.S. Filed July 6, 1948. [25]

Official Report of Proceeding Before The Tax  
Court of the United States

Docket No. 11856

HARRY A. ROBERTS, et al.,  
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

Hearing at Los Angeles, California

December 12, 1947 [26]

EXCERPTS FROM THE TRANSCRIPT  
OF TESTIMONY

\* \* \* \*

HARRY A. ROBERTS,

Petitioner, called as a witness for and on his own  
behalf, having been first duly sworn, was examined  
and testified as follows:

The Clerk: Tell us your name, Mr. Witness,  
please.

The Witness: Harry Alexander Roberts. [27]

Direct Examination

By Mr. Howard:

Q. What is your occupation, Mr. Roberts?

A. Taxicab driver.

Q. How long have you been thus engaged?

A. Seven years.

Q. By whom are you employed?

A. The Yellow Cab Company.

Q. Were you so employed during the year 1943?

A. Yes.

(Testimony of Harry A. Roberts.)

Q. And still are?           A. Yes, sir.

Q. In the year 1943 you filed your income tax return, I take it, Mr. Roberts?           A. Yes, sir.

Q. Did you or did you not include any money received as tips?           A. I did not.

The Court: Counsel, you haven't asked him where he was employed. The situation might be different in different cities.

By Mr. Howard:

Q. During this year 1943 and up to the present time, will you state the place of your employment?

A. Yellow Cab Company in Los Angeles, California. [28]

Q. By Los Angeles, California, what districts does that include?

A. You mean the surrounding territory that we work?

Q. Yes.

A. Los Angeles, Beverly Hills, Hollywood, North Hollywood, and West Los Angeles.

Q. In that period of time you worked also generally within the limits of the City of Los Angeles?

A. Yes, sir.

Q. After you filed your 1943 return without including tips, about when was it that you were summoned to the Collector's office and requested to file an amended return to include tips?

A. Approximately a year afterwards.

Q. Did you receive any advice of counsel as to whether or not you should include tips either in your original return or your amended return?

(Testimony of Harry A. Roberts.)

A. Not in my original, I don't believe.

Q. On your amended return did you—the amended return that was requested at that time—had you received advice of counsel that tips were not a part of a taxable income?      A. I was.

Q. Now, during the period of the year 1943, you did receive certain tips, did you not?

A. I did. [29]

Q. From passengers?      A. Yes.

Q. Did you in the year 1944 or '45, whenever it was that the request to file an amended return was made upon you, have any record of the amount of tips you received?      A. No, I didn't.

Q. You have no such record now?

A. No, sir.

Q. Are you able to state generally what proportion of your passengers tipped or did not tip?

A. Well, I would say approximately 50 per cent.

Q. Of that 50 per cent of the passengers who did tip, what would you consider, assuming that tips are taxable income, would be a fair percentage of your gross bookings?

A. Approximately 10 per cent of that.

The Court: Read that question to me, Mr. Reporter.

(The question was read.)

By Mr. Howard:

Q. By "gross bookings," I mean of the gross amount you received from the passengers who did tip. What would be a fair percentage, in your mind?      A. About 10 per cent.

(Testimony of Harry A. Roberts.)

Q. Of those who did tip?

A. Of those who did tip, yes, sir.

Q. In other words, the amount of an individual [30] passenger's bill, who tipped you, you would consider 10 per cent fair?

A. Yes, sir.

Q. But that, in your opinion, would not include those who didn't tip?

The Court: This is your own witness. Don't lead him. You will discount his testimony if you do.

By Mr. Howard:

Q. Now, in your contract with the Yellow Cab Company, state whether or not you had any instructions or directions not to solicit tips or gratuities.

A. We have instructions not to in any way whatsoever or any services whatsoever that we do for them. I am only allowed to charge them what the meter says, and that is all.

Q. Now, in the tips that you did receive during this time, were there any such tips received by reason of solicitation upon your part?

A. No, sir.

Q. Now, in your contract with the Yellow Cab Company, are such incidental services as the carrying of bags or the like included in your wages paid by the company?

A. Yes, they are.

Q. Mr. Roberts, can you think of any service in the year 1943 that you rendered to any passenger that was not compensated for to you by your employer, the company? [31]

A. I cannot.



(Testimony of Harry A. Roberts.)

Q. What was the basis of your compensation from the Yellow Cab Company during the year 1943?      A. You mean my salary?

Q. Yes, whatever they agreed to pay you.

A. In 1943, I think it was 45 per cent of the take, or \$6.00 a day, whichever was the greater.

Q. Approximately how many days did you work, working days or nights, in 1943?

A. Days, I worked approximately 240-250 days, I imagine, a year.

The Court: You were also asked about nights.

The Witness: I did not work nights. [32]

\* \* \* \*

### Cross Examination

By Mr. Hurley:

Q. Mr. Roberts, you testified that approximately 50 per cent of your patrons tipped, is that correct?

A. Fifty per cent, yes.

Q. Yes. Let's consider for a moment an average fare, a 50-cent fare, for example. That would be a typical fare, is that correct, in this city?

A. That is right.

Q. Now, let's confine ourselves for a moment simply to the patrons who tip. Now, let's take the example of a tipping [33] patron on a 50-cent fare. How much of a tip do you usually get from such a patron?      A. From a 50-cent fare?

Q. Yes.      A. It is usually a dime.

Q. I see. What percentage is a dime of 50 cents?

(Testimony of Harry A. Roberts.)

Mr. Howard: It is a matter of computation, we will stipulate.

Mr. Hurley: If the Court please, I don't wish to trick the witness into making—

The Court: The objection is overruled.

By Mr. Hurley:

Q. What percentage of 50 cents is a dime?

A. What percentage of 50 cents is a dime?

Q. Yes.

A. It would be 20 per cent, wouldn't it?

Q. That is right. Now, if half your fares tip, and if that half would give on the average of 20 per cent, your over-all tips, counting tippers and non-tippers, would approximate 10 per cent, is that correct?

Mr. Howard: I object to the question as misleading unless it refers to a 50-cent trip.

Mr. Hurley: Let's assume for the moment that it refers to a 50-cent trip.

The Court: Assume that in answering the question, [34] if you can.

The Witness: Would you repeat it, please?

By Mr. Hurley:

Q. Well, you see what I am getting at, Mr. Roberts. Apparently on direct examination your testimony was that since 10 per cent of the gross bookings is the average tip, and since only half of your patrons, in your experience, are actually tippers, that reduces the percentage of over-all bookings to 5 per cent. Is that the substance of your testimony on direct examination? A. That is right, sir.

(Testimony of Harry A. Roberts.)

Q. Well, what I am trying to point out, Mr. Roberts—and you are at liberty to explain what you mean—is that, where only half of your patrons tip, if they tip over 10 per cent, as you testified a moment ago, the 50-cent patrons do, it raises it above 5 per cent, doesn't it, upon the gross bookings?

A. Yes.

Q. Let's take another example. Let's take an 80-cent fare and let's again confine ourselves simply to the tippers. Now, you have in your cab an 80-cent fare who is a tipper. How much does he usually tip you?

A. They usually tip a dime also.

Q. They usually tip a dime?

A. Yes, sir.

Q. How about a dollar fare?

A. Well, the majority of dollar fares, you don't get anything. They will hand you a dollar bill.

Q. How about a 30-cent fare?

A. Well, a 30-cent fare, you get usually a dime, once in a while you might get 15 cents.

Q. What percentage of 30 cents is a dime?

A. It would be about  $33\frac{1}{3}$ , I believe.

Q. What percentage of 30 cents is 15 cents?

A. Almost half.

Q. Did you consider those fares in arriving at your general estimate of what the percentage of gross bookings would be, when 50 per cent of your patrons tip?

A. I didn't get your question, sir?

Q. I mean, Mr. Roberts, did you consider, when you testified on direct examination, that your tips averaged 10 per cent, did you consider that a lot

(Testimony of Harry A. Roberts.)

of your averaged tips 50 per cent or 33 $\frac{1}{3}$  per cent?

A. Yes, I did.

Q. You took that into consideration?

A. Yes, sir.

Q. What is your average fare in town, would you say?

A. Well, really don't know. I would say that the average fare is about 80 cents.

Q. About an 80-cent fare? [36]

A. I would think that would come pretty close to it.

Q. Are a majority of your fares 80 cents?

A. No, I wouldn't say so.

Q. Is there any one fare that you could say constitutes a majority of your fares?

A. No, I couldn't.

Q. They are pretty much split up, is that correct?

A. Yes, sir. Some days you might have all short trips, and the next day all long ones, so you never know.

Q. Do you consider yourself, Mr. Roberts, an average cab driver?      A. Yes, sir.

Q. Do you feel that your tips received over the course of a year are fairly typical of the experience of cab drivers in Los Angeles?

A. Yes, I do, speaking for the others; I couldn't speak for them, but I mean—

Q. Well, I understand that. Now, with respect to the uniform item, how many uniforms have you at the present time? [37]

(Testimony of Harry A. Roberts.)

Q. Did you keep any record of these tips that you received in 1943?      A. No, sir.

Mr. Hurley: That is all.

Redirect Examination

By Mr. Howard:

Q. Mr. Roberts, what would you say would be the smallest fare that your taximeter reading would show, and what the maximum fare that your taximeter would show for your trips?

A. The minimum is 30 cents now. It was 20 cents in 1943—I believe it was either 15 or 20, I don't remember which, but there is no maximum.

Q. Well, how large do these taxi fares run at times?

A. Well, you get lots of flat rates at ten, fifteen, or twenty dollars.

Q. Now, in your upper-bracket fares, can you elucidate a little bit on what the tips would be for a \$10.00 job, or a [38] \$5.00 job, or a \$3.00 job, from your experience?

A. Usually you get nothing on those kind of trips. People that ride those kind of trips never give you anything.

Q. Now, in the course of your operating a taxicab, do you convey passengers who do not pay you in cash?      A. Yes, sir.

Q. To what extent would you say that exists?

A. Well, we use the Yellow Cab scrip, and there are charge accounts that the Yellow Cab Company has. They have several charge accounts here in the city where we transport their employees—

(Testimony of Harry A. Roberts.)

Q. As, for instance, Mr. Roberts, what—

A. The Telephone Company, for one, transport their employees back and forth from work, and it is strictly a charge account. They sign the meter receipt and that is all you get.

Q. Did you ever get tips where there is a charge account?

A. You never get a tip on a charge account, never.

Q. Did that condition exist in the calendar year 1943?           A. Yes, sir.

Q. How about hospitals and doctors?

A. They have lots of charge accounts with the different hospitals, that is, the Southern Pacific Railroad, the Union Pacific, the Santa Fe, where there are several hundred trips [39] each day that are charge accounts to the hospitals that we never get anything on.

Q. Now, taking the smaller bracket, or the moderate bracket trips, let me ask you what is the taxicab fare from here out to Hollywood where I have my office.

A. From downtown here, approximately \$1.80.

Q. Have you frequently made the trips from downtown Los Angeles to Hollywood?

A. I have.

Q. From your recollection, what would you say was the customary tip from those who did tip on that?

A. A dime or 15 cents; once in a while you might get 20 cents.

(Testimony of Harry A. Roberts.)

Mr. Howard: No further questions.

The Court: Anything further.

Mr. Hurley: That is all.

The Court: Let me ask you one or two questions, Mr. Roberts. You spoke about fare, I think you said \$10.00, \$15.00, and \$20.00.

The Witness: Yes, sir.

The Court: Do you mean that no one paying such fares as that ever tip?

The Witness: No, sir, it is usually servicemen going from here to the Harbor, and they don't have the money. It is a rush order and it is someone that rides a taxicab that [40] far who is usually someone that has to get there on short notice and they just don't have the money for tips when they ride trips like that.

The Court: Now, do you mean that none of them—

The Witness: Well, once in a while.

The Court: Well, that is what I wanted to get at.

The Witness: Not all, probably one out of twenty-five.

The Court: That is what I wanted to get at. Is there any system of computing the mileage that you cover in a year or any other period of time?

The Witness: Well, there is a record every night of the mileage we cover, it is on the meter sheet that comes out of the meter.

The Court: The company would have it at the end of the year?

(Testimony of Harry A. Roberts.)

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The Court: The company would have it at the end of the year?

(Testimony of Harry A. Roberts.)

The Witness: Yes, sir.

The Court: Would they furnish that to you?

The Witness: No, sir.

The Court: Then you wouldn't have any record of how many miles you covered in a year?

The Witness: No, sir, it just would be on the daily basis. [41]

\* \* \* \*

### PHILIP DAVIS,

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

The Clerk: Tell us your name, Mr. Witness, please.

The Witness: P. C. Davis, or Philip C. Davis.

### Direct Examination

By Mr. Howard:

Q. What is your occupation, Mr. Davis?

A. I am a taxicab driver. [42]

Q. For whom?

A. For the Yellow Cab Company of Los Angeles.

Q. Where?

A. Out of the Beverly Hills area, Beverly Hills garage.

Q. How long have you been a taxicab driver?

A. Twenty-one years.

Q. How long have you been employed by the Yellow Cab Company?      A. About 16½ years.

(Testimony of Philip Davis.)

Q. During all of that time in the Los Angeles area? Yes, sir.

Q. Are you also the representative of a group of some three hundred to three hundred fifty taxicab drivers, having to do with income tax matters?

A. I was elected their chairman.

Q. As such, have you acquainted yourself with the problems of this group generally?

A. I have.

Q. As well as the Petitioners herein?

A. I have.

Q. Have you frequently had conferences with the representatives of the Commissioner and the Collector's office of this district? A. I have.

Q. In your 21 years—did I understand you to say as a taxicab driver—have you become familiar with the method [43] of payment of cab drivers?

A. Very much so, sir.

Q. Are you familiar also with what is called the custom of tipping that exists in some instances?

A. I am.

Q. Based upon your observation and experience, can you give us an estimate of the proportion of passengers of taxicabs who tip?

A. That would be, in my opinion, strictly according to district, area, and also whether it be night or day.

Q. Well, break it down and give us your best answer, Mr. Davis.

A. I worked 17 years nights. Naturally, you drive the same people, but maybe under a different

(Testimony of Philip Davis.)

environment. Are we talking about 1943 or years prior?

Q. Relate it to 1943.

A. In 1943 you had gross business that was much more out of proportion than it is at the present time in regard to your number of tips, but what we consider regular cab riders, I would say that approximately 40 or 50 per cent of the people that are in and out of your taxicab give you something.

Q. Now, that something that they give you, from your observation and experience and your relationship with your employer, which I understand has been the same for 21 years, are you permitted to solicit, directly or indirectly, any tips? [44]

A. None whatsoever. In fact, before you get your license the Board of Public Utilities, who govern the taxi drivers in this area in the City of Los Angeles, give you instructions in regard to your procedure while being a cab driver. They imply and stress upon the point that anything beyond the fare will be scorned on or looked down on and your license will be revoked if you attempt to collect anything further, I mean, in a forceful manner or demanding manner.

Q. Do you have similar or identical instructions as to your activities from your employer as to the solicitation of tips?

A. They conform with the Board of Public Utilities, with the addition that you are to assist your passengers in all ways, and that covers a multitude of ways that you—well, they are in your

(Testimony of Philip Davis.)

charge once they enter your car. That is your general instruction.

Q. Is there any service that you render to a passenger which is not covered by the taximeter bill?

A. No, there is none, no charge that can be made for any additional.

Q. Now, I am referring to the carrying of bags and things of that sort. In your understanding or contract with your employer, are you compensated by your employer for such service on your part?

A. You are compensated under the matter of a guarantee [45] or a commission, whichever exceeds, it is just a part of salary and it is expected of you.

Q. Generally speaking, and referring not merely to yourself, but to the organization that you represent, what is the salary basis as of the year 1943?

A. The yearly salary?

Q. No, just the salary basis, what is their wage contract, what do they get?

A. Well, it is run on a seniority basis with the Yellow Cab Company. To start out, I believe at that time, between the first year you were on the rate of 40 per cent or \$6.00 a day, whichever was greater. After serving one year, you automatically went to 42½, which extended for three years, and after three years you were given 45 per cent.

Q. Now, from your experience and your knowledge gained from the members of your organization, what, in your opinion, Mr. Davis, would be a

(Testimony of Philip Davis.)

fair basis, percentage basis, of the fare received from those who do tip?

A. Oh, I don't know. I would more than likely concur to Mr. Roberts' estimate on that, about 10 per cent. It would in this matter. I might make an explanation to that, that you get your ten, occasionally your quarter, on your short trips or on your long trips, but you wouldn't get your 10 per cent proportionately on a two or three dollar trip, basing it on a 50-cent estimate of a dime. [46]

Q. Now, to what extent does this custom of hauling customers on credit exist?

A. Well, there are numerous accounts for the Yellow Cab Company, such as the railroad crews, which were in existence very much in the year 1943, the telephone companies from all their various branches and exchanges, doctors, different automobile exchanges and hospital units. It is according to what area you work out of whether you get those.

Q. Now, you might enlighten the Court and counsel a little bit upon the matter of districts and its relation to tips, whether the tips are received in one district to the same extent as they are in others.

A. Well, you take our Central Avenue district. I will wager to say that if you average two tips out of ten to twelve trips, you are doing good. If you are in the Highland Park district and your East Side district, they are low tipping districts. Your downtown areas at night might be better than days. As you go farther west to the Hollywood area and to the Beverly Hills area, where you have more of

(Testimony of Philip Davis.)

the richer type of people and their homes, maybe you might get a fair return from your individual trip. Of course, that extends out into the North Hollywood area, where tips are very small because the cab business is being introduced to those people. They came from all sections to build that area, and so maybe they weren't accustomed to taxicabs or the habit. [47]

Q. Now, with reference to the credit items that you started to tell us about, do you receive any tips where you haul passengers for the Telephone Company or the hospitals or what not?

A. None whatsoever. In fact, we just recently had a bulletin where evidently it must have been new drivers that expressed their personal feelings toward hauling these trips, and they were somewhat berated by the company, that they had no right to expect anything beyond that, and that is a recent bulletin. Of course, old-timers know that.

Q. You consider yourself an old-timer?

A. Well, fairly.

Q. Now, with reference to bulletins, you heard Mr. Roberts' testimony as to his having been contacted in this instance, requested to file an amended return to include tips, and I take it you are familiar with the score or so of others in the same category?

A. Yes. To my knowledge, the first notices that were sent out were sent out in the Hollywood area and sent out for the years of '43 and '44. Delinquent or amended returns were to be made for that,

(Testimony of Philip Davis.)

and it was started the first week of September, 1943. That was the first knowledge we had.

Q. After you received that knowledge, did you advise members of your organization to keep a daily record of tips after that? [48]

A. Well, not at that specific date, because we had a representative of the Government come down and answer questions in regard to what it was. Everyone didn't understand it, even though you had been with the company a number of years and driven a taxicab all that time, and after that it was through that method that I became chairman of this group of men which amounted to approximately—well, I became representative of that group which amounted to around 700 men that gave the amount of moneys that were raised to try this case, or test it.

Q. After that had occurred, you therefore did advise them to keep their daily records, is that right?

A. I advised them on numerous occasions to always keep a daily record.

Q. Now, you also consulted on behalf of these men, including the Petitioners, counsel for the purpose of determining counsel's opinion as to whether tips were taxable or not, did you not?

A. I did.

Q. Were you advised on behalf of your organization that in the opinion of counsel that tips constituted gifts and were not taxable income?

A. I was. [49].



(Testimony of Philip Davis.)

Q. Taking the typical instance that I cited to Mr. Roberts, say, of a trip from here to my office—you know where my office is—what, in your opinion, would be, from one who tipped, the usual tip for that \$1.80 fare? [50]

A. Well, one who tips—in my estimation, it is wide open. A man might constitute—you don't usually get less than a dime, and you might get 20 cents or occasionally a quarter.

Mr. Howard: That is all. You may cross-examine.

#### Cross-Examination

By Mr. Hurley:

Q. Mr. Davis, have you kept actual records of the tips that you received?

A. No, I haven't, other than in keeping a daily record since I was informed to do so.

Q. You did not keep a record during the year 1943?      A. Not prior to that, no.

Q. Was the year 1943, so far as tips were concerned, an average year, a better than average year, or not quite average?

A. Well, it was a better than average.

Mr. Hurley: That is all.

Mr. Howard: No further questions.

By the Court:

Q. Let me ask you this, Mr. Witness: You said, a moment or two ago, that you rarely got less than a dime, or something to that effect. I want you to tell me whether you mean by that, regardless of

(Testimony of Philip Davis.)

how much the fare is, at that time you were talking about a \$1.80 fare, I believe, but what I want to know is whether it is true or not true that you rarely get less than [51] a dime, assuming that you get anything.

A. That is right, sir, you hardly get a tip less than a dime, although you do have exceptions to that where you will get a nickel.

Q. I want to ask you a question about these long, expensive trips, \$5.00, \$10.00, or \$20.00. You have heard the testimony in that regard?

A. Yes, sir.

Q. What would you say, about what percentage of such patrons tipped you and how much?

A. Well, the \$15.00 and \$20.00 trips, sir?

Q. Yes.

A. Well, that all depends on the individual, sir.

Q. Give us your best judgment as to what percentage of them would tip.

A. Well, I would say they are less than the average regular run.

Q. What per cent would they tip?

A. Well, I imagine 25 to 50 cents at the most. There will be exceptions to that, but that would be the average, sir.

Q. In the course of a year, back in 1943, there might be a difference because of war conditions then, so we will not talk about now. In the course of a year, what would you say as to how many

(Testimony of Philip Davis.)

\$10.00 patrons the ordinary taxicab driver would be likely to have? [52]

A. Oh, working days, I imagine they would be shorter than they would be at nights. The reason why I state that is because transportation, as you know, in 1943 was somewhat jammed up, and even at its best it was crowded. People did have access and time in daylight to make these out-of-the-way trips though we were restricted mostly to our confined areas during those times, and the only exceptions made to that were for emergencies like railroad trips or sicknesses or something of that type. We had instructions by the Government bureaus that handled transportation to restrain us to our Los Angeles area.

Q. Well, that gives me a general idea, but it still doesn't answer my question. In 1943 what would be your best idea as to how many \$10.00 fares in the course of a year the ordinary taxi driver here in Los Angeles would have?

A. Oh, I wouldn't estimate more than one a month.

Q. One a month. \$5.00 fares?

A. Well, it may be, five, six, or seven a month.

Q. Would it be more at night than it would be during the day?

A. Yes, it would, though that doesn't stand to be absolutely true if you might have all your trips in the daytime and wouldn't get any at night, that wouldn't exceed that much, but that is the average.

(Testimony of Philip Davis.)

The reason I make that, was on account of the statement of transportation being at a [53] premium at that time.

Q. You told about the percentage of take that you received, or an ordinary taxi driver would receive, from the company in 1943, and you went up to 45 per cent. I am not clear as to whether that is the top.

A. That is the top, was the top at that time. That was the top, and the required seniority and the number of years in order to get that, sir.

Q. Well, now, in 1943 there was gasoline rationing, was there not?           A. Yes, sir.

Q. Did that increase the number of taxi patrons?           A. Very much so, about trebled it.

The Court: I believe that is all I want to ask.  
By Mr. Hurley:

Q. I wasn't quite clear, Mr. Davis, on the statement that you made about being restricted to the Los Angeles area.

A. We were restricted to the area. I don't know what the ABC classification of it by a transportation unit of the Government was.

Q. That is during the taxable year 1943?

A. Yes. That restrained us from leaving the city limits of Los Angeles with the exception of emergencies.

Q. Well, in other words, these \$15.00 or \$20.00 trips weren't very common, or, in fact, were impossible except for [54] emergencies?

(Testimony of Philip Davis.)

A. Except for railroads and sickness, or something of that type, where we had specific reasons to go beyond those limits.

Mr. Hurley: That is all.

Redirect Examination

By Mr. Howard:

Q. Let me ask you this one question: Within the City of Los Angeles, what would be the maximum fare within the city limits from one end of the city limits to the other?

A. Well, it is 44 miles long, and we have a license to cover that entire area. The trip from Los Angeles to the San Pedro area runs around \$8.00.

Mr. Howard: That is all.

The Court: You are excused.

(Witness excused.)

The Court: Call your next witness.

Mr. Howard: May I ask counsel—we have had some conferences relative to this matter—whether counsel is willing to stipulate that the other witnesses, well, some score or more that we indicated that we could produce, who are members of this organization that Mr. Davis told you about, if they were called to the stand, if counsel would stipulate that their testimony substantially along the general lines, and not, of course, pertaining particularly to the amounts of Mr. [55] Roberts' complaint or the allegations supporting the same, if he will stipulate that their testimony will be substantially the same?

Mr. Hurley: If the Court please, I couldn't

very well stipulate any such thing, nor have I ever agreed to stipulate such a thing. These witnesses have testified concerning the very issue in the case, and to stipulate that some three hundred or so cab drivers who are themselves partisans in this case would testify the same way, I would be perfectly willing to try the case for a week before I would stipulate to that.

However, Mr. Howard did question of me to stipulate one thing concerning the testimony, which I am perfectly willing to do, and that is, your Honor, I am perfectly willing to stipulate that the Collector has in the instance of each of these several hundred drivers issued notices of deficiency in cases where it was required, or what was oftener the case, merely requested an amended return upon the same basis, namely, 10 per cent. That was what Mr. Howard was interested in, as I understood him when we had pre-trial discussions. He was interested in making it unnecessary to bring in a group of drivers to testify that the Collector had gone down the line in each case and set each of these taxpayers up upon the same basis. I am perfectly willing to concede that fact. In fact, it is common knowledge that that is the way it is. I obviously couldn't stipulate the weight of the testimony of 350 witnesses who would come in and testify to the same thing. As a matter of fact, if I didn't have witnesses to the contrary, I could have cross-examined indefinitely certain of the testimony that has been on the stand already.

Mr. Howard: If the Court please, I do not engage in controversies with counsel at the counsel table as to any verbal arrangement for stipulation. I merely state that my recollection of our discussion was much different. The particular matters that I am concerned with are not those that relate to the precise amount of the deficiency insofar as Mr. Roberts is concerned, but I believe that each one of some twenty-odd witnesses will testify substantially the same as Mr. Davis and the Petitioner, as to the amount of tips, the proportion of tippers among the passengers, and what they consider to be a fair percentage of the gross amount that they would receive from the persons who tip. I believe that these gentlemen will also testify in support of the testimony of Mr. Davis and Mr. Roberts that they were forbidden to solicit tips and that all of the services rendered by a taxicab driver were included within their wages. Those are chiefly the only items that I would like to introduce further testimony on, in view of counsel's refusal to so stipulate. Your Honor might consider it cumulative, but we are in that position.

The Court: I will say now that I am not going to listen [57] to 20 cumulative witnesses.

Mr. Hurley: I wish to say this, that insofar as taxicab drivers being forbidden to solicit tips, I am willing to stipulate to that. I am willing to stipulate further that all the services are included in the fare, but obviously I couldn't stipulate that the conclusion, the very issue in the case, namely, would

be fair estimate of the tips or would be corroborated by several hundred witnesses any more than I would expect counsel to take the testimony of my witnesses on the same issue and stipulate that I could go out and get another hundred witnesses to testify to the same effect.

I am willing to stipulate to what are obviously facts, but I am certainly not willing to stipulate to the very issue in the case.

Mr. Howard: We will accept the stipulation as presently stated by counsel.

The Court: That settles that.

What says the Petitioner?

Mr. Howard: I believe under that situation, if your Honor please, the Petitioner now respectfully rests.

The Court: Petitioners rest, what says the Respondent?

Mr. Hurley: I have several witnesses, your Honor.

The Court: If you have several witnesses, we are not going to finish this matter this evening.

Mr. Hurley: If your Honor please, as far as my direct examination is concerned, I intend to expedite it as rapidly as possible. I don't know about counsel's cross-examination.

Mr. Richardson.

Whereupon,

ORVILLE RICHARDSON

called as a witness for and on behalf of the Re-



(Testimony of Orville Richardson.)

spondents, having been first duly sworn, was examined and testified as follows:

The Clerk: Tell us your name, please.

The Witness: Orville Richardson.

Direct Examination

By Mr. Hurley:

Q. Mr. Richardson, what is your present occupation?

A. Personnel director of the Yellow Cab Company of Los Angeles.

Q. How long have you held that position?

A. For 13 months, the last 13 months.

Q. What was your position before that time?

A. Previously I was a traffic superintendent and a starter, and before that a taxicab driver.

Q. What years were you driving a taxicab in Los Angeles?

A. In '41, '42, '43 and part of '46 when I came back from the Army. [59]

Q. During that time, Mr. Richardson, did you keep actual records of the tips received from patrons?  
A. I did.

Q. Can you tell us from your records what those tips averaged in terms of ratio of tips to gross bookings?

A. Oh, they would average straight through at least 10 per cent through the year.

Q. Would you say that a 10 per cent average of tips to gross bookings is a conservative average of the tips received by the average cab driver who

(Testimony of Orville Richardson.)

drives a Yellow Cab?           A. Yes, I would.

\* \* \* \*

### Cross-Examination

By Mr. Howard:

Q. Just one or two questions, Mr. Richardson. You are presently personnel director?

A. That is right.

Q. When did you quit driving a cab?

A. In July of 1946.

Q. Where were you employed in the year 1943?

A. I was employed for the first month in 1943 as a driver with the Yellow Cab Company.

Q. After that you did not drive during the year 1943?

A. I was in the Army for the three years after that.

Mr. Howard: No further questions.

### Redirect Examination

By Mr. Hurley:

Q. On further question, Mr. Richardson. Does that estimate that you gave and your records on the tips received cover 1941, 1942 and that portion of 1943 that you worked for the Yellow Cab Company as a cab driver?

A. That is true, they do.

Q. Is that correct?           A. Yes. [61]

\* \* \* \*

### LLOYD E. BRYSON

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

(Testimony of Lloyd E. Bryson.)

The Clerk: Will you tell us your name, Mr. Witness, please?

The Witness: Lloyd E. Bryson.

Direct Examination

By Mr. Hurley:

Q. Mr. Bryson, what is your occupation at the present time?

A. I am a cab driver for the Yellow Cab Company of Los Angeles.

Q. How long have you been a driver for the Yellow Cab Company?

A. For the Yellow Cab Company direct about 13 years.

Q. Would you speak a little louder so the Court can hear you?

A. About 13 years for the Yellow Cab Company directly.

Q. How long have you been driving a cab? [62]

A. A little over 17 years in all.

Q. Were you subpoenaed to appear and testify in this proceeding on behalf of the government?

A. I was, sir.

Q. Were you employed as a cab driver by the Yellow Cab Company in Los Angeles in 1943?

A. I was.

The Court: What year did you say?

Mr. Hurley: 1943.

The Court: I thought you said 1944. Proceed.

By Mr. Hurley:

Q. From your 17 years experience as a cab

(Testimony of Lloyd E. Bryson.)

driver, are you familiar with the tipping habits of the general public so far as taxicab drivers are concerned?      A. I am.

Q. What was the answer?

A. I am, yes, sir.

Q. Is it a custom among patrons to tip?

Mr. Howard: Now, we object to that question even on the grounds of expedition.

Mr. Hurley: I think the question is perfectly proper.

Mr. Howard: It calls for a conclusion of the witness.

The Court: The objection is overruled. You can always prove custom. [63]

The Witness: Is it customary for a certain per cent, yes.

By Mr. Hurley:

Q. Do most patrons tip?

A. I would say approximately 50 per cent.

Q. Mr. Bryson, when we discussed the matter prior to the trial of this proceeding, did you tell me that it was—you can answer this question yes or no—did you tell me that it was customary to tip, and as a matter of fact, “Most people would feel like a heel,” to quote you, “if they did not.”

Mr. Howard: Now, if the Court please, we don't believe that counsel should cross-examine his own witness.

Mr. Hurley: I am not trying to impeach the

(Testimony of Lloyd E. Bryson.)

witness, I am trying to refresh his memory. A great deal has apparently happened.

The Court: Yes, you can cross-examine the witness if you are surprised by the witness.

Mr. Hurley: I am indeed, your Honor. I discussed the matter with him in the hall not more than an hour and a half ago.

The Court: Answer the question if you can. The objection is overruled.

The Witness: There are personal reasons there.

The Court: What is that? [64]

The Witness: It would be in personal cases. The average person, I would say, tips because it is a custom.

By Mr. Hurley:

Q. All right. Mr. Bryson, what do you consider a fair and reasonable estimate of the percentage of tips to gross bookings received by Yellow Cab drivers over the period of a year, and particularly with reference to the year 1943?

A. Well, I would say that the 10 per cent is a fair average.

Mr. Hurley: That is all.

#### Cross-Examination

By Mr. Howard:

Q. Now, Mr. Bryson, in arriving at your 10 per cent, are you computing that upon the amount of the tips received from the persons who do tip or are you computing it upon the total amount of your bookings? Which is it?

(Testimony of Lloyd E. Bryson.)

A. I was computing that on the total amount of bookings.

Q. Now, you first testified, I believe, in answer to counsel's question, that only approximately 50 per cent of the people tipped. Is that still your testimony?

A. I think that is about a fair estimate.

Mr. Howard: That is all.

#### Redirect Examination

By Mr. Hurley:

Q. Mr. Bryson, are you correcting the testimony that [65] you gave, namely, that it was customary with most people to tip, or are you reverting to the original statement that you made? If you recall, I attempted to refresh your mind on what you had originally told me was your opinion on this matter, and it was my understanding that upon refreshing your mind you changed your testimony to agree with your original statement to me out of this court, that it was customary from the standpoint of the public to tip, and that you said the average person tips, as I understand it. Is that your testimony? Now, are you changing your statement again or just where do you stand on this?

A. What I was trying to convey is that we were discussing why people tipped, and I said that most people will tip because it is customary to do so.

Q. Does the average person tip in the sense that—do a majority of people that enter your cab tip you?

(Testimony of Lloyd E. Bryson.)

A. I would say perhaps it would run a little bit better than 50 per cent.

Mr. Hurley: That is all.

Mr. Howard: That is all.

The Court: You are excused.

(Witness excused.)

The Court: Call your next witness.

Mr. Hurley: Mr. Herbert C. Hendry, please.

The Court: I am not going to allow you to [66] accumulate this too far.

Mr. Hurley: This is the last witness.  
Whereupon,

HERBERT C. HENDRY,

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Tell us your name, Mr. Witness, please.

The Witness: Herbert C. Hendry.

Direct Examination

By Mr. Hurley:

Q. Mr. Hendry, what is your occupation?

A. Taxicab driver with the Yellow Cab Company of Los Angeles.

Q. How long have you been a Yellow cab driver?

A. Going on 16 years.

Q. Have you been driving cabs in Los Angeles for that time?           A. I have. [67]

\* \* \* \*

(Testimony of Herbert C. Hendry.)

Q. Were you subpoenaed, Mr. Hendry, to appear in this proceeding to testify in behalf of the government?      A. I was, sir.

Q. From your experience as a cab driver in Los Angeles, what do you consider a fair and reasonable estimate of the percentage of tips to gross bookings received by Yellow Cab drivers averaged over a period of a year, particularly with respect to the year 1943?

A. Well, that 10 per cent of the bookings is a very reasonable amount, that is, figuring about 50 per cent of the people—it is a pretty good average, too—for the tipping public. [68]

Mr. Hurley: That is all.

#### Cross Examination

By Mr. Howard:

Q. You said figuring about 50 per cent of the people tipped?      A. About that.

Q. That is your best estimate as to the number of people?

A. Well, that is a pretty good average for the year. That is not the average every day, though.

Q. On this 10 per cent, are you considering solely the people that tip as being 10 per cent as a fair basis?

A. True. 50 per cent, I would say, of the people I haul in a year.

Q. Tip?      A. That is a fair basis.

Q. Now, do you mean that the 10 per cent of this fare would be the usual tip?

A. 10 per cent of our gross bookings would be, yes.



(Testimony of Herbert C. Hendry.)

Q. In other words—

A. That would be fair.

Q. If only 50 per cent of the people tipped, then, your testimony is that you would get 20 per cent of your fare per tip?

A. No, I say in 1943 tht 10 per cent would be a fair [69] gross—that is, fair. I didn't say that it would be more, I said that it would be fair. That is what you asked me.

Mr. Howard: That is all.

Mr. Hurley: I want to clear this testimony up, if your Honor please, for a moment.

Redirect Examination

By Mr. Hurley:

Q. In other words, Mr. Hendry, if you take your gross bookings for the whole year after all the people you took and you took a figure of 10 per cent of that regardless of who tipped you and who didn't, just the total of your gross bookings, would 10 per cent of that figure be a fair and reasonable amount of the tips you received?

A. In my case it would.

Q. Would you say it was a fair estimate for the average cab driver?

A. I wouldn't say for the average cab driver since there are so many things stipulate to whether a cab driver gets a tip.

Q. Well, I mean—

A. But in my case I would say it would be, it is a fair estimate.

Q. Are you familiar with what the average

(Testimony of Herbert C. Hendry.)

driver receives in tips? Don't you frequently compare tips with each other? [70]

A. Well, I don't. I never talk about tips, but 10—I imagine, I would say would be, in my estimation—would be for the average cab driver.

Q. But, in other words, you don't know that another cab driver from yourself receives less?

A. I never pay any attention to any other man.

### Recross Examination

By Mr. Howard:

Q. You are basing your testimony solely upon your personal experience?

A. That is all I could base it on.

Q. You have no further knowledge aside from your own estimate as to your position?

A. I do not.

Mr. Howard: That is all.

By the Court:

Q. Let me ask you this, Mr. Witness: There has been some testimony here about it being the tipping manner, and perhaps the amount of fares being different in different districts. I believe Hollywood has been mentioned and some other districts, which I assume were meant to be very poor districts. Now, let me ask you this: Do you cover all of these districts, or did you in 1943, or were you limited to one district?

A. In 1943, yes, we were—once we were at Beverly [71] Hills alone, but then the place was opened up and we worked all these districts, combined. Now, in 1943 I am not sure whether we did or not, but

(Testimony of Herbert C. Hendry.)

we were permitted to pick up anywhere where we had our licenses, and I am familiar with these districts. Central Avenue is one.

Q. What I am interested in is whether during 1943 you covered the city generally or were limited to some particular kind of a district, poor or rich?

A. Mostly in Beverly Hills.

Q. Mostly in Beverly Hills? A. Yes.

The Court: I believe that is all I want to ask.

Mr. Hurley: May I ask the witness one further question?

The Court: Yes.

Redirect Examination

By Mr. Hurley:

Q. The testimony that you gave concerning the percentage of tips, what was a fair estimate in your case. Does that apply for other years besides 1943? Is that a general estimate, from your experience?

A. Well, I wouldn't be able to say for the present time, but I imagine it would be—of the entire year, I imagine, at the present time it would be a little more than what you actually do get, because you see, the point [72] today is that we don't have the regular cab riders. We carry many people, servants, and as a rule as was once before stipulated, you get down to the Central Avenue district, you get down to the colored district, and some of them do, but the average time you don't get a tip out of them unless they know you.

Q. Mr. Hendry, so far as your testimony is concerned, and in response to my question as to what

(Testimony of Herbert C. Hendry.)

is a fair estimate over a year's period of the tips to gross bookings, is that estimate that you gave an estimate applicable, in your experience, to all or most all of the years that you have worked, or have you confined that to 1943?

A. That is what I thought you were speaking of, 1943. Before the war broke out, we were—our bookings—we were lucky if we booked \$10,00 a day.

Q. I am not speaking of the bookings, I am speaking of the average tips in relation to the bookings.

A. In relation to the bookings, yes.

Q. What in relation to the bookings?

A. The 10 per cent to the amount of our bookings.

Q. Was that fair?                   A. Sure.

Q. In other words, this ratio of 10 per cent to gross bookings is a ratio which was fair to other years prior and subsequent to 1943, is that correct?

A. Yes, sir.

Mr. Hurley: That is all.

#### Recross Examination

By Mr. Howard:

Q. You have related your personal idea as to the fair tips as relates to bookings based upon your own personal experience as a cab driver in the year 1943, and I believe—

Mr. Hurley: I think that is incorrect. I think that the witness' testimony is that that is his experience for all years, or substantially all. In other words, over his cab driving career.

(Testimony of Herbert C. Hendry.)

Mr. Howard: Well, if you will let me correct the question, counsel.

Mr. Hurley. You can't finish a question by making a misstatement.

The Court: Finish the question.

Mr. Howard: I will rephrase the question.

By Mr. Howard:

Q. Based upon your personal experience, disregarding your opinion as to the other years, that is, related just to the year 1943, you arrived at the estimate as to your personal experience as a cab driver that 10 per cent of bookings was fair, that is right, isn't it?      A. Yes, sir.

Q. Now, I will ask you if in that year you did not work [74] out of the richest district in Los Angeles.

A. The richest district in Los Angeles doesn't give as much as poor districts individually.

Q. But did you or did you not work out of the Beverly Hills district?      A. Not continuously.

Q. Most of the time you were out of the Beverly Hills garage?

A. You see, I worked day work, and most of our day work is from home to bus down to the depot, down to the bus line, down to the store, taking the children to school and those kinds of trips you hardly ever get a tip, and from the street car back up to Hills again.

Q. Did you ever work out of Boyle Heights in the year 1943?

A. Once in a while I pick up a load.

(Testimony of Herbert C. Hendry.)

Q. The Central Avenue district?

A. Not continuously. As I say, if I loaded down there, I would on my way back pick up a load on the way out.

Q. As I understand it, you boys work out of a certain garage, is that right?

A. That is right.

Q. In the year 1943 you were assigned most of the time to the Beverly Hills garage, is that correct?

A. I still am a Beverly Hills detail. [75]

Q. And in 1943 you were? A. Yes, sir.

Mr. Howard: That is all.

Mr. Hurley: If your Honor please, I am sorry to prolong this a little further.

#### Redirect Examination

By Mr. Hurley:

Q. Mr. Hendry, the testimony that you gave concerning what is a fair and reasonable estimate from your experience as a cab driver, does that apply to the years that you have been a cab driver, which I believed you testified is some 17, is that correct?

A. Going on 16.

Q. All right, 16 years. Does that apply to those years and for the City of Los Angeles and not confined to Beverly Hills?

A. Well, I would—on a run of a year, I would say yes.

Q. In other words, the 10 per cent so far as the year 1943 is concerned is a very conservative estimate, is it not? A. I think so.

(Testimony of Herbert C. Hendry.)

Q. In other words, if you actually figured it up, it would be higher than 10 per cent?

The Court: This is your own witness.

Mr. Hurley: He has agreed with me, your Honor. I am trying to speed this up. I appreciate the fact that it is [76] the rapidity with which I was placing the question was not with the idea of impeaching the witness, but so as to conclude the hearing as expeditiously as possible. He has agreed with me, so that I have no further questions at this time.

The Court: Let me ask you this, Mr. Witness, one more question: 1943 was during the war, as I can take judicial notice of, of course, now tell me whether or not during that war time period tipping was more liberal or less liberal than ordinarily.

The Witness: It was more liberal because people—it was hard to get taxicabs and when a person got it, he was very pleased with the service, the fact that he could get a cab, so in my estimation it was more. Some people, of course, aren't the tipping kind, of course, but, of course, they never tip.

The Court: That is all I want to ask.

Mr. Howard: I have no further questions.

The Court: You are excused, Mr. Witness.

(Witness excused.)

Mr. Hurley: Respondent rests.

The Court: Respondent rests, what says the Petitioners?

Mr. Howard: The Petitioners rest. I have just one rebuttal witness. Mr. Davis, please.

(Testimony of Herbert C. Hendry.)

The Court: In stating that I wouldn't listen to 20 [77] witnesses accumulate, I didn't intend to limit you to two witnesses, counsel for the Petitioners.

Mr. Howard: I understand that.

Whereupon,

PHILIP DAVIS,

called as a witness for and on behalf of the Petitioners, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Howard:

\* \* \* \*

Q. You heard the testimony of the last witness on the stand, Mr. Davis, as to his opinion as to a fair proportion [78] of gross bookings and tips. What garage do you work out of?

A. The Beverly Hills garage.

Q. How long have you worked out of that?

A. Oh, about two and one-half years.

Q. Had you previously worked out of there in the year 1943?

A. They didn't have a garage before that. I worked out of the Hollywood and Beverly Hills garage. I mean, the Hollywood garage covered the Beverly Hills and the Hollywood area.

Q. How would you contrast or compare the tips received by an individual cab driver working out of Beverly Hills with other districts in this area?

A. Approximately 25 or 30 per cent more.

[Endorsed]:Filed Dec. 30, 1947. [79]



[Title of Tax Court and Cause.]

REVISED DESIGNATION OF CONTENTS OF  
RECORD ON REVIEW

To: The Clerk of the Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Court of Appeals for the Ninth Circuit copies duly certified as correct of the following documents and records in the above entitled cause in connection with the petition for review heretofore filed by Harry A. Roberts and Ruth M. Roberts:

(1) The docket entries of all proceedings before the Tax Court.

(2) Pleadings before the Tax Court, as follows: (a) Petition; (b) Answer; (c) Petitioners' reply (not of record).

(3) The findings of fact and opinion of the Tax Court.

(4) The decision of the Tax Court.

(5) The petition for review.

(6) The testimony of the witnesses, beginning on line 20, page 8, and ending on line 14, page 68 [80] of official report of proceedings at Los Angeles, California, on December 12, 1947, but excluding therefrom the following: Line 14, page 13, to and including line 14, page 17; line 20, Tr. 21, to and including line 8, Tr. 23; the last two lines of page 26, all of page 27, and the first fifteen lines of page 28; the last two lines of page 35 and the first 21 lines of page 36; lines 12 through 25, page

46; the last four lines of page 47, all of pages 48, 49 and 50, and the first five lines of page 51; the last six lines of page 56 and the first 13 lines of page 57; lines 11 through 23, page 67.

(7) This designation of contents of record on review.

GILBERT J. HEYFRON,  
EARL E. HOWARD,  
Attorneys for Petitioners.

Agreed to:

/s/ CHARLES OLIPHANT,  
Chief Counsel, Bureau of Internal Revenue, Attor-  
ney for Respondent.

[Endorsed]: Filed July 15, 1948. [81]

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### CERTIFICATE

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that the foregoing pages, 1 to 81, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeceptum in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 21st day of July, 1948.

(Seal) /s/ VICTOR S. MERSCH,  
Clerk, The Tax Court of the  
United States.

[Endorsed]: No. 11999. United States Court of Appeals for the Ninth Circuit. Harry A. Roberts and Ruth M. Roberts, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed July 29, 1948.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

